IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.73 OF 2004

Shri Aziz Abdulla Chunawala .. Appellant

versus

M/s. Firdos Apartments Co-op. Housing Society Ltd. .. Respondent

...

Mr. MM Vashi for the appellant.

Mr. Avinash Chindane for respondent.

CORAM : D.G. KARNIK, J

DATED :22nd September 2006.

P.C:-

1. Heard learned counsel for the parties.

2. This appeal is directed against the order dated 17th December, 2002 passed by the City Civil Court, Mumbai in Notice of Motion No.5842 of 2000 in S.C. Suit No.6941 of 2000, restraining the appellant from

selling, transferring or creating third party interest in the five garages constructed by the appellant upon the suit property bearing Survey No.203-A, Hissa No.3, C.T.S. No.482 at Irla, Gulmohar Road, JVPD Scheme, Vile Parle, Mumbai.

3. Apellant is a builder promoter and respondent is a co-operative housing socieity of the flat purchasers. Appellant promoted a scheme, is popularly known as 'ownership flats scheme' in the suit property. The scheme consisted of 50 flats and 7 detached garages. All the flats had been constructed and five out of seven detached garages have also been constructed. Possession of the flats has been handed over to the flat purchasers who are the members of the respondent society. According to the parties three out of five garages have already been sold and have been purchased by some of the flat holders in the society. The two constructed garages, however, remain unsold and two more garages are yet to be constructed.

4. Respondent society filed a Suit bearing S.C. Suit No.6941 of 2000 against the appellant in the City Civil Court for an order and decree to execute a deed

of conveyance of the suit property in its favour. In the said suit the respondent took out a motion bearing Motion No.5842 of 2000 for the relief of injunction restraining the appellant from selling and/or creating third party interest in the five garages constructed by the appellant on the suit property. By an order dated 17th December, 2002 the trial judge allowed the motion and granted injunction. That order is impugned in this appeal.

5. At the haring of the appeal counsel for the appellant and respondent both submitted that out of five garages constructed on the suit property three garages have already been sold to and purchased by the members of the respondent society and neither of the parties have any dispute regarding the same. Therefore, this appeal is restricted to the relief of injunction in respect of the remaining two garages. Counsel for the appellant also submitted that appellant has a right to construct two more garages as per the plan sanctioned by the municipal corporation. However, that is not a subject matter of the appeal and appellant would take separate steps for enforcing his right to construct the remaining two garages. The

appeal, therefore, does not relates to the two garages yet to be constructed by the appellant.

6. Learned counsel for the respondent society produced for my inspection a copy of the sanctioned plan. Said sanctioned plan shows that the municipal corporation had sanctioned construction of 50 flats and a detached building consisting of seven garages. It is not the case of the respondents that the plan for the garages was not shown to the flat purchasers or that the plan does not permit construction of the garages. The only grievance made before me by the counsel for the respondent is that the five garages which had constructed by the appellant are not strictly in acordance with the sanctioned plan. On being asked in what way the construction of the garages was in variance with the sanctioned plan, counsel for the respondent submitted that the sanctioned plan showed that the garages would have rolling shutters with a grill of about 1 and 1/2 feet hight in the front but the appellant has constructed the rolling shutters without a grill. the grill. Learned counsel for the appellant submitted that fixing of grill to the rolling shutters is not

condition of the plan and it is not necessary to fix the grill. However in order to placket the respondent, the appellant is willing to fix a grill of 1 and 1/2 feet in the rolling shutters as shown in the sanctioned plan. The appellant through his advocate undertakes to do so. The undertakding is recorded and accepted. In view of this undertaking, in my view, the respondent would have no right to make any further grievance regarding the garages.

7. Learned counsel for the respondent further submitted that as per the sanctioned plan the garages can be sold only for parking of vehicles and not for the purpose of business. The appellant through his advocate undertakes that the garages would be sold only for the purpose as parking of the vehicles, and such a condition will be put in the agreement of sale with the purchasers. Therefore this grievance of the respondent also does not survive.

8. While admitting the appeal this Court, by an order dated 5th March, 2004 granted stay to the impugned order of injunction. Said stay is in force till today. Thus, there was no order of injunction

restraining the appellant from selling the garages. However, by way of abundant caution, counsel submits, the appellant has not sold the two garages so far. The appellant would now have the liberty to sold two garages subject to the two conditions namely, i) appellant would fix a grill of 1.5 feet to the existing rolling shutters or replace them with new rolling shutters with a grill so as to conform to the sanctioned plan and ii) the appellant shall sale the garages only for the purpose of parking of vehicles and not for business, and shall insert a condition to that effect in the agreement to sell.

9. Learned counsel for the respondent submitted that the appellant had given an undertaking to the court that he would convey the suit property in favour of respondent society within a period of six months and the appellant has committed breach of the said undertaking. According to the counsel for the appellant , the appellant was willing to execute the sale deed however the respondent did not approve the draft of the sale deed and therefore the sale deed could not be executed. As the respondent has initiated proceedings for contempt for breach of the

underataking, it would not be appropriate to express any opinion in this order regarding the alleged breach of the undertaking.

10. In the circumstances, appeal is allowed in part. Impugned order is set aside. Appellant is permitted to sale the remaining two garages subject to the two conditions mentioned above.

11. Order of the stay of the suit stands vacated.

(D.G. KARNIK, J.)